EXHIBIT "A"

PROCEDURAL HISTORY

1. On or about September 4, 2007, Plaintiff, Michael Boswell filed a complaint in the Superior Court of New Jersey, Middlesex County, naming Steve Eoon, Kirsten Byrnes, Christina Eickman, Ptl. James Feaster (improperly named as Feister), New Brunswick Police Department and the City of New Brunswick as Defendants. Essentially, Plaintiff contends that on September 4, 2005, at 2:16 am, Plaintiff, a pedestrian who was crossing Rte. 18, was struck twice, by motor vehicles driven by Eoon and Byrnes. (See Exhibit A, para. 1, 5). The two count complaint alleged negligence as to Eoon and Byrnes (Count I) and negligence against Officer Feaster, the New Brunswick Police Department and the City of New Brunswick (Count II). Specifically as to the New Brunswick Defendants, Plaintiff alleged that a) Officer Feaster knew or should have known that Plaintiff was intoxicated (See Exhibit A, Count II, para. 4); b) that Officer Feaster knew or should have known that Plaintiff was homeless (See Exhibit A, Count II, para. 5); c) that by Officer Feaster directing Plaintiff to leave Boyd Park, this caused Plaintiff to walk across Rte. 18, where he was ultimately struck by two (2) motor vehicles (Exhibit A, Count II, para. 6); d) that Officer Feaster instead should have removed Plaintiff from the park, providing social services assistance (Exhibit A, Count II, para. 7, 8, 10); and e) that

the City and Police Department were negligent in their supervision and training of Officer Feaster. (Exhibit A, Count II, para. 14).

2. On or about October 23, 2007, an answer was filed on behalf of Ptl. James Feaster, New Brunswick Police Department and the City of New Brunswick. (Exhibit B).

3. On or about August 29, 2008, the Hon. Pedro J. Jiminez, Jr. J.S.C entered an Order permitting Plaintiff to file an Amended Complaint to include additional counts alleging violations of Plaintiff's civil rights under 42 U.S.C. §1983. On or about September 9, 2008, Plaintiff filed his First Amended Complaint to include both State law negligence claims (Count 1 and II) and Civil Rights violations (Counts III and IV). Plaintiff had been now deemed incapacitated and a guardian, Ethel Boswell, appointed. As to the Section 1983 claims, Plaintiff alleged violation of his Fourteenth Amendment rights, specifically substantive due process and a liberty interest in personal security (Count III) and a Monell claim (Count IV). (Exhibit D)

4. On or about October 15, 2008, the New Brunswick Defendants filed a notice of removal (Exhibit E; Dkt. No. 1).

5. On or about July 27, 2009, Plaintiff filed a Second Amended Complaint, adding an additional Fifth Count, alleging a violation of the New Jersey Civil Rights

Act, N.J.S.A. 10:6-2, again citing his substantive due process rights, and asserting a loss of consortium claim on Ethel Boswell's behalf. (Count VI). (Exhibit F; Dkt. No. 17).

6. On August 10, 2009, an Answer to the Complaint was filed by Craig L. Corson, on behalf of the Defendants, Feaster, City of New Brunswick and the New Brunswick Police Department, wherein the allegations asserted by Plaintiff were denied in their entirety and defenses were asserted. (Exhibit G; Dkt. No. 7)

7. On August 18, 2009, an Answer to the Complaint was filed by Stephen R. Dumser, on behalf of the Defendants, Kirsten Byrnes and Christina Eickman, wherein the allegations asserted by Plaintiff were denied in their entirety and defenses were asserted. (Exhibit I; Dkt. No. 20)

8. On August 25, 2009, an Answer to the Complaint was filed by Mario C. Colitti, on behalf of the Defendant, Steve Eoon , wherein the allegations asserted by Plaintiff were denied in their entirety and defenses were asserted. (Exhibit H; Dkt. No. 21)

9. By Order, dated December 2, 2009, the Hon. Lois H. Goodman, U.S.M.J. Ordered that dispositive motions shall be filed no later than February 26, 2010 and made returnable on March 22, 2010. (Exhibit J, Dkt. No. 24).

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STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The New Brunswick Police Department is an agency within the City of New Brunswick, a duly-formed entity of the State of New Jersey (hereinafter the "City").

2. The New Brunswick Police Department operates pursuant to the applicable state and federal laws, as well as, the rules, regulations, orders, directives, policies and procedures which are consistent with the Guidelines promulgated by the Office of the Attorney General of New Jersey. (Exhibit K, Deposition of Mangarella, T17:9-T18:10 & T26:19-T27:5).

3. The New Jersey Legislature has required that all individuals appointed as municipal police officers successfully complete a training course approved by the New Jersey Police Training Commission and be certified as a police officer by the Police Training Commission (PTC). N.J.S.A. 52:17Bb-66, et seq.

4. After police academy training and New Brunswick's required in service initial training, all officers with the New Brunswick Police Department receive use of force, domestic violence, blood borne pathogen, and firearms training on a bi-annual basis, in compliance with the Attorney General Guidelines. (Exhibit K, Deposition of Mangarella, T11:8-22).

5. Officer Feaster has been a Patrolman with the New Brunswick Police Department for approximately twenty six years. (Exhibit L, Deposition of Feaster, T8:13-15 & T10:14-16).

6. Officer Feaster attended the Middlesex County Police Academy in 1983. (Exhibit L, T11:1-5).

7. After completing the Academy, Officer Feaster completed a six-week in service training with the New Brunswick Police Department. (Exhibit L, T11:10-16).

8. Officer Feaster has also received accident investigation, drug recognition, alcohol recognition, and firearms training. (Exhibit L, T14:16-19).

9. With specific regard to alcohol recognition, Officer Feaster was trained to make observations of an individual's movements, breath, physical appearance, and other visible signs attendant to demonstrations of alcohol use. (Exhibit L, T84:20-T85:1)

10. As a Patrolman, Officer Feaster's duties include general maintenance of the public safety, enforcing motor vehicle laws, including driving while under the influence (DWI), investigating motor vehicle accidents, investigating criminal activities, settling disputes, enforcing laws, directing traffic and issuance of summonses for violations of the law. (Exhibit L, T14:23-T15:3 & T18:10-17)

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11. At all times relevant to this matter, Officer Feaster was acting in his official capacity as a Police Officer with the New Brunswick Police Department.

12. On September 4, 2005, Officer Feaster was working the night shift from 8:30 pm to 6:45 am. (Exhibit L, T16:17-22).

13. He was assigned to a patrol vehicle. (Exhibit L, T19:5-7).

14. On September 4, 2005, Officer Feaster entered Boyd Park, driving a marked patrol vehicle. Officer Feaster entered Boyd Park through the entrance by the Rutgers University Boathouse and traveled along a paved road through the park which runs parallel to the canal. (Exhibit L, T27:1-6 & T27:24- T28:5).

15. At the time, the Northern boundary of Boyd Park was New Street, the Southern boundary was the Rutgers Boathouse, the Eastern boundary was a Canal, and the Western boundary was Highway/Route 18 which Commercial Avenue intersected. (Exhibit L, T25:23-T26:7).

16. As he was driving through Boyd Park, Officer Feaster saw something by the picnic tables. Activating the spotlight on his patrol car, Officer Feaster saw a figure, or person, sit upright on a bench. (Exhibit L, T28:6-10).

17. Officer Feaster continued driving towards the picnic table area. He contacted Police Headquarters, and advised that he was stopping an unknown individual in Boyd Park. (Exhibit L, T29:12-16).

18. Officer Feaster exited his vehicle approximately ten (10) feet from the bench where the individual was seated. (Exhibit L, T31:15-18).

19. Approaching from his patrol vehicle, Officer Feaster walked up to the individual and stood, facing him, approximately five (5) feet away, on the opposite side of the picnic table where the individual was seated. (Exhibit L, T32:11-13 & T34:9-11).

20. Officer Feaster could see the unidentified individual clearly as the headlights and spotlight of the patrol vehicle were directed at the individual. The person remained seated with his hands visibly placed on the picnic table. The individual made no statements of any kind as Officer Feaster approached the picnic table. (Exhibit L, T33:20-22; T34:12-17 & T35:1-3).

21. Officer Feaster asked the individual to provide identification. (Exhibit L, T33:9-13).

22. In response to Officer Feaster's directive, the individual put his hand into his pocket and handed Officer Feaster an identification card. In responding to Officer Feaster, the individual made no statements.(Exhibit L, T35:6-25 & T36:5-7).

23. The identification card provided the individual's name, date of birth, and address. (Exhibit L, T36:12-14).

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24. In supplying Officer Feaster with the requested identification, the individual, (now identified to the Officer as Michael Boswell, Plaintiff in the instant matter), remained seated on the bench making no verbal comment or statement of any kind. (Exhibit L, T38:2-12).

25. Returning to the patrol vehicle with the identification card, Officer Feaster called Police Headquarters to run a check for outstanding warrants on Plaintiff. The inquiry came back negative. (Exhibit L, T38:6-12).

26. Following the "warrants check", and at approximately 1:55 am, Officer Feaster issued Plaintiff a summons for being in a city park after hours, in violation of New Brunswick Ordinance 12:28-010, which limits individuals from being in the park a half hour after sunset. (Exhibit L, T38:16-23 & T:43:20-21)(Exhibit M, ticket issued to Plaintiff)

27. Officer Feaster provided the ticket to Plaintiff. In response, Plaintiff questioned Officer Feaster as to why he was being issued the ticket. (Exhibit L, T69:6-10). Mr. Boswell's speech was clear, not slurred, and he was cooperative. (Exhibit L, 69:6-24 & T44:24-T45:4)

28. In response to the Plaintiff's inquiry, Officer Feaster stated, "...you're not supposed to be in the park at night. You're not supposed to be here. I'm issuing you this summons. You're going to have to leave." (Exhibit L, T44:4-9 and T69:9-15).

29. After being issued the Summons, and being told that he had to leave the park, Plaintiff stood up, so as to move away from the table area, and to leave the Park. (Exhibit L, T45:5-8).

30. Officer Feaster continued to observe Plaintiff as he walked away from the immediate area of the picnic table. (Exhibit L, T45:9-10).

31. Plaintiff began walking in the direction of the canal, which bordered the city park. The location of the canal was approximated by Officer Feaster to be about one-hundred (100) yards from the location of his interaction with Plaintiff. (Exhibit L, T49:6-26).

32. Addressing the Plaintiff yet again, Officer Feaster pointed in the general direction of Commercial Avenue, only advising Plaintiff that he had to leave the park area. (Exhibit L, T50:4-7 & T90:11-23).

33. Responding to Officer Feaster's directive, Plaintiff walked around a concession stand located in the area, and began walking towards Commercial Avenue. (Exhibit L, T51:4-9). Plaintiff's coordination was good and he walked in a balanced manner. (Exhibit L, T45:6-13).

34. It was in and around this time that Officer Feaster first noticed an open quart bottle of beer, which was half-full, under the picnic bench where Plaintiff had been seated. (Exhibit L, T45:20-T46:11; Exhibit M, tickets).

35. At no point had Officer Feaster observed Plaintiff drinking from the bottle. (Exhibit L, T91:17-22).

36. Officer Feaster threw the bottle out in a trash can. (Exhibit L, T47:3-9).

37. Watching Plaintiff as he walked from the area, Officer Feaster observed Plaintiff ripping up the ticket that he had been issued. (Exhibit L, T51:12-18).

38. Officer Feaster also heard Plaintiff making remarks as he ripped the ticket into several pieces. Officer Feaster could not hear specifically what Plaintiff was saying as he walked away from the area ripping up the ticket. (Exhibit L, T51:21-24).

39. Returning to his patrol vehicle, Officer Feaster began writing a second ticket for Plaintiff having an open container of beer. (Exhibit L, T52:8-13), (See Exhibit M, Summons).

40. Officer Feaster intended to serve this second ticket by having it been sent to Plaintiff via mail, or attaching it to the first Summons and serving it on him in Court. (Exhibit L, T54:19-22).

41. Officer Feaster continued to observe Plaintiff walking out of Boyd Park towards Commercial Avenue from his patrol vehicle. Plaintiff had no difficulty walking. (Exhibit L, T66:22-T67:1)

42. At all times during their interaction, Plaintiff appeared to understand Officer Feaster, was cooperative with Officer Feaster, and responded immediately and appropriately to all commands made by Officer Feaster. Plaintiff's speech in addressing Officer Feaster was clear and coherent, his physical coordination was controlled and balanced and Officer Feaster detected no odor of alcohol during his interaction with Plaintiff. There was no visible signs of intoxication observed by Officer Feaster. (Exhibit L, T44:19-23; T45:6-16; T48:18-22; T67:13-16 & T69:14-17).

43. Based on his training and experience, Officer Feaster made sufficient observations of Plaintiff and determined that he was not intoxicated. Plaintiff presented himself such that Officer Feaster reached the conclusion that Plaintiff was not intoxicated, was not a danger to himself or others, and that Plaintiff evidenced no need for medical care and/or attention. (Exhibit L, T90:24- T91:9).

44. Based on his training and observations of the entire encounter, at no point did Officer Feaster believe Plaintiff was under the influence of alcohol or a controlled substance. (Exhibit L, T67:22- T68:4 & T91:4-6).

45. Officer Feaster chose not to arrest Mr. Boswell, because Mr. Boswell had identification, did not appear incapacitated by alcohol and was not a danger to himself or anyone. (Exhibit L, T72:16-T73:1 & T85:17 to T86:11; Exhibit K, T32:19-

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21). However, if Mr. Boswell was harmful to himself or to others, or if Officer Feaster had reason to believe that Mr. Boswell was incapacitated by alcohol, he had the option to taken him to Robert Wood Johnson for an initial evaluation. (Exhibit K, T34:14 to T35:1; N.J.S.A. 26:2B-16; Exhibit L, T73:20-25). Officer Feaster did not think that Mr. Boswell was a danger to himself, that Mr. Boswell was in danger, or that he was intoxicated. (Exhibit L, T69:1-4, T85:17-T86:11).

46. Thereafter, Officer Feaster heard a radio dispatch which advised of an accident at the intersection Highway/Route 18 and Commercial Avenue. (Exhibit L, T77:7-12).

47. Officer Feaster drove his patrol vehicle to the intersection of Route 18 and Commercial Ave. and was the first Officer at the scene of the accident, which had occurred in the Southbound lanes of Rte. 18, a six (6) lane highway. (Exhibit L, T77:14-17). (Exhibit N, Barber deposition, T41:16-20).

48. Officer Feaster observed two vehicles in the intersection. Advised by an individual at the scene that there was a person under one of the cars, Officer Feaster looked under the vehicle and recognized the clothing of the Plaintiff. (Exhibit L, T77:18- T78:11).

49. Officer Feaster immediately radioed for an ambulance, a Road Supervisor, an Identification Unit, and for the Department's Traffic Safety Unit. (Exhibit L, T79:5-9).

50. Once Officer Barber, the Traffic Officer, arrived on scene, he conducted the accident investigation on behalf of the New Brunswick Police Department. (Exhibit L, T81:6-11).

51. Officer Feaster did not observe Plaintiff cross at the intersection. (Exhibit L, T75:16-17).

52. Plaintiff has no independent recollection of the accident of September 4, 2005, or of events leading to the subject accident. (Exhibit O, Deposition of Ethel Boswell, T49:22-T50:18). There are no other fact witnesses to the interaction between Officer Feaster and Plaintiff.

53. Plaintiff contends that Officer Feaster, the City of New Brunswick and the New Brunswick Police Department were negligent, violated Plaintiff's civil rights and violated the New Jersey Civil Rights Act. (See Exhibit E, Plaintiff's second amended complaint).

54. Plaintiff has retained Mr. Williams, a police liability expert, who has opined that Officer Feaster should have removed Mr. Boswell, as he was highly intoxicated, from Boyd Park. Mr. Williams further comments that Officer Feaster,

in failing to remove Mr. Boswell from Boyd Park, ignored his training and the "requirements" of the New Brunswick Police Department and the State of New Jersey. (Exhibit P, Williams' reports)

55. The New Brunswick defendants retained former Chief Kraus, who opined that based upon Mr. Boswell's behavior and conduct while in the presence of Officer Feaster, all actions taken by Officer Feaster were proper and within accepted police practices and procedures. Further, as there was no evidence of intoxication shown, Officer Feaster could not have detained Mr. Boswell, nor was he under a duty to do so. (See Exhibit Q, Report of William F. Kraus).

56. Multiple experts have been retained, based upon Mr. Boswell's blood alcohol concentration range (BAC) of .24% taken at Robert Wood Johnson University Hospital after the accident. Mr. Saferstein, Plaintiff's toxicologist, has opined that a typical individual, who had a blood alcohol concentration range of .24%, would have displayed unmistakable signs of alcohol impairment, such as poor coordination and balance, slurred speech and an unsteady gait. (Exhibit R, Saferstein report). However, Mr. Boswell had a history of alcohol related complaints, hospital visits and admissions, and physiological changes which were consistent with chronic alcoholism and a increased tolerance to alcohol. (Exhibit S, Reports of Dr. Schwartzer, Internist; Exhibit T, Deposition of Schwartzer, T22:6-T23:24; Exhibit

U, Report of Dr. Pandina, toxicologist; Exhibit V, Pandina deposition, T24:20-25). As such, an individual who has developed a high tolerance for alcohol, rather than a "typical" individual, could speak without slurring, respond reasonably to questions, sit up and remain still, display fine motor skills such as presenting identification to a police officer, display gross motor control, such as walking without losing balance or coordination and negotiate a fence. (Exhibit N, Deposition of Gary Lage, toxicologist retained by Bynes/Eickman, T37:21-T38:17; Exhibit U, Pandina's report; Exhibit V, Deposition of Pandina, T38:18-T40:22; Exhibit T, Deposition of Schwartzer, T26:8-15, T41:3-T43:1 & T70:24-T41-2)

EXHIBIT "B"

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JOHN D. HORTON, Plaintiff, v. MARIA T. COSME, CITY OF TRENTON, Defendants.

Civ. No. 06-6114 (GEB)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2008 U.S. Dist. LEXIS 51693

July 7, 2008, Decided
July 8, 2008, Filed

NOTICE: NOT FOR PUBLICATION

SUBSEQUENT HISTORY: Affirmed by Horton v. Cosme, 2009 U.S. App. LEXIS 20003 (3d Cir. N.J., Sept. 4, 2009)

COUNSEL: [*1] **JOHN D. HORTON, Plaintiff,** Pro se, JOBSTOWN, NJ.

For **MARIA T. COSME,** *Court Administrator,* **CITY OF TRENTON, Defendants: KIMBERLEY M. WILSON,** *LEAD ATTORNEY,* CITY OF TRENTON, DEPARTMENT OF LAW, TRENTON, NJ.

JUDGES: GARRETT E. BROWN, JR., U.S.D.J.

OPINION BY: GARRETT E. BROWN, JR.

OPINION

MEMORANDUM OPINION

BROWN, Chief Judge

This matter comes before the court upon the motion of defendants Maria T. Cosme ("Cosme") and the City of Trenton ("Trenton," collectively "Defendants") for summary judgment (Docket No. 17) and the cross motion of *pro se* plaintiff John D. Horton ("Plaintiff") for summary judgment (Docket No. 23). This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 1331 and 1367, and has considered the parties' submissions and decided the matter without oral argument pursuant to Federal Rules of Civil Procedure 78. For the reasons set forth below, this Court will grant Defendants' motion for summary judgment and deny Plaintiff's motion for summary judgment.

I. BACKGROUND

In October 2005, Plaintiff was charged with failure to observe a traffic signal. (Compl. at 3; Defs.' SL. Civ. R. 56.1 Statement of Material Facts ("Statement") P 1.) On or around December 14, 2005, Plaintiff was found guilty before [*2] Trenton Municipal Court. [1] (Compl. at 3; 56.1 Statement P 1.) Plaintiff alleges that, upon his request, the monetary fine imposed for his traffic violation was converted into a community service obligation. (Compl. at 3.) Plaintiff further alleges that he fulfilled this obligation and that the supervisor of the community service program submitted written documentation of such to the court clerk, defendant Cosme, of the Trenton Municipal Court. (Id. at 3-4, 8.) Plaintiff alleges that on December 4, 2006, the Trenton Police Department ("TPD") mailed Plaintiff a "Notice of Warrant for Arrest Issued" for an unanswered traffic summons. (Compl. at 9.)

1 Plaintiff contends he was found guilty after a trial. Defendants contend that Plaintiff pled guilty. For reasons discussed below, this difference is of no significance.

The parties agree that Plaintiff has not, at any time, been arrested by TPD officers. (Defs.' Br. at 4; Pl.'s Op. Br. at 2.)

On December 20, 2006, Plaintiff filed a *pro se* complaint pursuant to 42 U.S.C. § 1983, alleging that Cosme, and Trenton had violated his Fifth Amendment rights by "denying him the right to be free from double jeopardy," "attempting to prosecute the plaintiff [*3] twice for the same offense," and "attempting to impose multiple punishments against the plaintiff for the same offense." (Compl. at 4-5.) The Complaint also charges Cosme and Trenton with a number of additional claims that appear to be based on state law. These additional claims are as follows:

> libel, slander, defamation, invasion of privacy, deprivation of civil rights under color of law, the intentional interference with an employment of business relationship, the intentional infliction of emotional distress, mailing a threatening letter, attempting to extort money and the unlawful conversion of money through force, fear, and threats, attempted false imprisonment and conspiracy to commit all of the foregoing.

(Id. at 5.) Plaintiff seeks compensatory and punitive damages as well as an order to quash the arrest warrant and to close "all proceedings relating to New Jersey Highway Patrol summons SP2901011." (Id. at 6.) Plaintiff also seeks injunctive relief barring any New Jersey agency of law enforcement or prosecutorial agency from retaliating against him for filing this case. (Id.)

On February 22, 2008, Cosme and Trenton moved for summary judgment, seeking dismissal of all claims. Defendants [*4] submitted a Statement of Material Facts pursuant to L. Civ. R. 56.1. On March 10, 2008, Plaintiff filed an "Objection to the Defendants' Motion for Summary Judgment and Cross-Motion for Summary Judgment." Therein, Plaintiff denied Defendants' allegation that he had pled guilty to the traffic offense, but did not deny any of the other material facts presented in Defendants' 56.1 Statement. Plaintiff also did not submit any evidence in support of his arguments for summary judgment. On March 31, 2008, Defendants submitted a response to Plaintiff's cross-motion for summary judgment.

II. DISCUSSION

A. Standard

Summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56; see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). Issues of material fact are genuine only if the evidence presented could allow a reasonable jury to find for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). In deciding a motion for summary judgment, all facts must be viewed and all reasonable inferences must be drawn in favor of the nonmoving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), 106 S. Ct. 1348, 89 L. Ed. 2d 538. [*5] However, the nonmoving party "cannot rely upon conclusory allegations in its pleadings or in memoranda and briefs to establish a genuine issue of material fact" sufficient to defeat summary judgment. Pastore v. Bell Tel. Co., 24 F.3d 508, 511 (3d Cir. 1994); see also FED. R. CIV. P. 56(e) (nonmoving party's response must contain specific facts showing that there is a genuine issue for trial). [2]

> 2 In applying this standard, the Court is mindful of the "well-established principle that a *pro se* prisoner's pleadings should be held to less stringent standards of specificity and their complaints construed liberally." Lewis v. Attorney General of U.S., 878 F.2d 714, 722 (3d Cir. 1989); but see Day. v. Fed. Bureau of Prisons, 233 Fed. Appx. 132 (3d Cir. 2007) ("We need not, however, credit a *pro se* litigant's bald allegations or legal conclusions") (internal quotations omitted).

B. Application

1. No Issue of Material Fact

With one exception, Plaintiff does not deny the material facts set forth in Defendants' motion for summary judgment. The Court interprets this as admission of the uncontested facts. See Hill v. Algor, 85 F. Supp. 2d 391, 408 n. 26 (D.N.J. 2000) ("[u]nder L. CIV. R. 56.1, facts [*6] submitted in the statement of material facts which remain uncontested by the opposing party are deemed admitted"). Plaintiff does deny Defendants' allegation that he had pled guilty to the traffic offense committed on October 15, 2005. (Pl.'s Op. Br. at 1.) But this does not create a genuine issue of material fact because the issue of whether Plaintiff pleaded guilty to the traffic offense is irrelevant to either parties' arguments on summary judgment.

2. Defendants are Entitled to Judgment

a. Federal Claims

Plaintiff's only federal claim is pursuant to 42 U.S.C. § 1983, which provides a cause of action for the deprivation of rights guaranteed by the Constitution or federal law. Section 1983 states, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes

> to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983. [*7] Plaintiff claims that Defendants have violated his rights under the Double Jeopardy Clause of the Fifth Amendment. (Compl. at 4 & n.10; 5 & nn.11, 12.). Specifically, he argues that these violations arise from Cosme's

> refus[al] to accept that 1. a trial took place, 2. an order of the Trenton Municipal Court converted the monetary penalty into a certain number of hours of community service, and 3. that the requisite documentation from the community service establishment was filed by the plaintiff herein with the office of the Trenton Municipal Court clerk in accordance with the order of the Trenton Municipal court.

(Compl. at 4.) Plaintiff provides a copy of the handwritten document, dated January 18, 2006, from his supervisor at the community service establishment as evidence that he fulfilled his obligation. (Id. at 8.) He also provides a copy of the "Notice of Warrant for Arrest Issued" that TPD mailed to him on or around December 5, 2006. (Id. at 9.)

In this case, the Court needs to only address Defendants' first argument. Defendants contend that Plaintiff was never actually arrested pursuant to the arrest warrant and therefore has suffered no damages. (Defs.' Br. at 4.) Therefore, [*8] Defendants asserts that there has been no deprivation of constitutional rights, and consequently, Plaintiff has no cause of action under § 1983. (Id.)

Plaintiff does not deny his lack of arrest, but states that a lack of "immediately discernable damages does not preclude the finding of liability for a constitutional tort." (Pls.' Opp. Br. at 2.) Plaintiff, however, fails to provide any legal authority for this conclusion. Plaintiff further argues that the injury to his "peace and quietude" and the "constant threat and duress of a wrongful arrest" are injuries which merit monetary compensation. (Id. at 2-3.)

The Court concludes that Plaintiff is not entitled to recovery under § 1983 because his Fifth Amendment rights have not been violated. The Double Jeopardy Clause of the Fifth Amendment protects against a second prosecution for the same offense as well as against multiple punishments for the same offense. United States v. Baird, 63 F.3d 1213, 1215 (3d Cir. 1995). Yet "jeopardy does not attach and the constitutional prohibition can have no application, until a defendant is put to trial before the trier of the facts, whether the trier is a jury or a judge." Serfass v. United States, 420 U.S. 377, 388, 95 S. Ct. 1055, 43 L. Ed. 2d 265 (1975); [*9] see also Baird, 63 F.3d at 1218 (jeopardy does not attach until one is made party to a proceeding before a trier of facts who has power to determine guilt). It is undisputed that Plaintiff has not been arrested pursuant to the arrest warrant, let alone put on trial. Since jeopardy clearly has not attached in Plaintiff's situation, his federal claims must fail.

b. State Law Claims

As discussed above, Plaintiffs also asserts various state law claims. Pursuant to 28 U.S.C. § 1367(c)(3), a District Court "may decline to exercise supplemental jurisdiction over a claim . . . if . . . (3) the district court has dismissed all claims over which it has original jurisdiction." Such a determination is discretionary and "[t]he general approach is for a district court to . . . hold that supplemental jurisdiction should not be exercised when there is no longer any basis for original jurisdiction." Edlin Ltd. v. City of Jersey City, No. 07-3431 (PGS), 2008 U.S. Dist. LEXIS 41118, 2008 WL 2185901, at *7 (D.N.J. May 23, 2008) (quoting Atkinson v. Olde Economie Fin. Consultants, Ltd., No. 05-772, 2006 U.S. Dist. LEXIS 54289, 2006 WL 2246405 (W.D. Pa. Aug. 4, 2006)); see also City of Chicago v. Int'l Coll. of Surgeons, 522 U.S. 156, 172, 118 S. Ct. 523, 139 L. Ed. 2d 525 (1997) ("pendent jurisdiction [*10] 'is a doctrine of discretion, not of plaintiffs right,' and that district courts can decline to exercise jurisdiction over pendent claims for a number of valid reasons") (quoting United Mine Workers v. Gibbs, 383 U.S. 715, 726, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)). In this case, all of the federal claims are being dismissed at this time and there is no longer any basis for original jurisdiction. Thus, the Court, in its discretion, declines to exercise supplemental jurisdiction over the remaining state law claims.

III. CONCLUSION

For the foregoing reasons, Defendants' motion for summary judgment is granted and Plaintiff's motion for summary judgment is denied. An appropriate form of Order accompanies this Opinion.

Dated: July 7, 2008

/s/ Garrett E. Brown, Jr.

GARRETT E. BROWN, JR., U.S.D.J.

EXHIBIT "C"

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THE UNITED STATES SMALL BUSINESS ADMINISTRATION AS RECEIVER FOR PENNY LANE PARTNERS, L.P., Plaintiff, v. DAVID STEFANSKY, Defendant.

Civil Action No. 08-1967 (GEB)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2010 U.S. Dist. LEXIS 22603

March 10, 2010, Decided
March 10, 2010, Filed

NOTICE: NOT FOR PUBLICATION

PRIOR HISTORY: United States SBA v. Stefansky, 2009 U.S. Dist. LEXIS 41638 (D.N.J., May 14, 2009)

COUNSEL: [*1] For UNITED STATES SMALL BUSINESS ADMINISTRATION, Plaintiff: ARLENE P. MESSINGER, LEAD ATTORNEY, SMALL BUSINESS ADMINISTRATION, WASHINGTON, DC; STEWART W. LEE, LEAD ATTORNEY, GOTTESMAN, WOLGEL, MALAMY, FLYNN & WEINBERG, PC, NEW YORK, NY.

For DAVID STEFANSKY, Defendant: LANCE D. BROWN, LEAD ATTORNEY, DEPINTO & BROWN, LLC, HAMILTON, NJ.

JUDGES: GARRETT E. BROWN, JR., United States District Judge.

OPINION BY: GARRETT E. BROWN, JR.

OPINION

MEMORANDUM OPINION

BROWN, Chief Judge

This mater comes before the Court upon Plaintiff the United States Small Business Administration as Receiver for Penny Lane Partners, L.P.'s ("Plaintiff" or "SBA") Motion for Reconsideration. (Doc. No. 18.) The Court has reviewed the Plaintiff's submission and decided the motion without oral argument pursuant to Federal Rule of Civil Procedure 78. The motion is unopposed. For the reasons that follow, the Court will deny Plaintiff's Motion for Reconsideration.

I. BACKGROUND

The undersigned appointed the Plaintiff on May 16, 2006, as Receiver during the resolution of the related matter *United States v. Penny Lane Partners, L.P.*, Civil Action No. 06-1894. The SBA filed the instant complaint on April 22, 2008, "as receiver for Penny Lane Partners, L.P." [*2] ("Penny Lane") against Defendant. (Doc. No. 1.) An Affidavit of Service for Summons and Complaint was filed on June 4, 2008, which indicated that Defendant was served on May 29, 2008. (Doc. No. 3.) Thereafter, on June 26, 2008, Plaintiff filed its request for Entry of Default, and the Clerk's Office entered default on July 7, 2008. (Doc. No. 6.) Plaintiff filed its Motion for Default Judgment on October 31, 2008. (Doc. No. 7.) On November 30, 2008, Defendant filed Answer to the Complaint but did not file opposition to the Motion for Default Judgment. (Doc. No. 9.)

On May 15, 2009, the Court granted the Motion for Default Judgment but reserved on its determination of damages sum certain and ordered that Plaintiff provide the Court with additional, supporting information to justify the damages sought. (Opinion and Order, May 15, 2009; Doc. Nos. 14, 15.) After Plaintiff provided additional support, the Court denied Plaintiff's damages. (Order, Dec. 9, 2009; Doc. No. 17.) The Order denying the award of damages explained:

> The Court notes that while the Complaint states this action is a straight-forward breach of contract matter, upon the Court's request for additional clarifying information [*3] in support of damages, the Receiver asserted what amounted to be a "course of dealing" argument, requiring the Court to look beyond the four corners of the Limited Partnership Agreement and Assignment and Assumption Agreements. Essentially, the Receiver asserts that the Court should base its judgment on the "course of dealing" of Defendant, Jacob Stefansky, and Penny Lane Partners pre-receivership, and accordingly treat David and Jacob Stefansky as 50/50 owners of the interests acquired, despite the actual amount each individually contributed or the amount assumed by contract, as indicated by the signature of each on the Assumption and Assignment Agreements.

(*Id.* at P 8.) The Court continued, and held that "the Receiver has not proven damages on the pleadings upon which default judgment is based and instead now presents proof of damages for a theory of liability not stated in the pleadings." (*Id.* at P 9.)

Plaintiff filed a Motion for Reconsideration on December 23, 2009. (Doc. No. 18.) Defendant did not file opposition to the instant motion.

II. DISCUSSION

A. Plaintiff's Arguments

Plaintiff argues that the Court should reconsider its December 9, 2009 decision and award damages in favor [*4] of Plaintiff in the amount of $ 21,656.60 plus ten percent interest per annum from April 11, 2008. (Pl.'s Br. at 10; Doc. No. 19.) Plaintiff states that the Court "overlooked facts which showed that the December 1997 Agreement was modified and ratified to include Defendant David Stefansky as a party;" "mislabeled "course of dealing" for actions taken by David Stefansky, Jacob Stefansky and Penny Lane in modifying, ratifying and reaffirming the December 1997 Agreement;" "did not account the sequence of events that followed the December 1997 Agreement;" and "did not consider the counterpart signature page to the partnership agreement which David Stefansky executed on or about February 9, 1998." (*Id.* at 1-2.) Plaintiff maintains that "[t]he Stefansky defendants' liability to pay their unfunded capital commitment, whether jointly or severally, flows from the Penny Lane's Partnership Agreement." (*Id.* at 9.)

B. Standard of Review

In the District of New Jersey, motions for reconsideration are governed by FED. R. CIV. P. 59(e) and L. CIV. R. 7.1. The United States Court of Appeals for the Third Circuit has made clear that motions for reconsideration should only be granted in three situations: [*5] (1) when an intervening change in controlling law has occurred; (2) when new evidence becomes available; or (3) when reconsideration is necessary to correct a clear error of law, or to prevent manifest injustice. *N. River Ins. Co. v. CIGNA Reinsurance Co.,* 52 F.3d 1194, 1218 (3d Cir. 1995). If none of these three bases for reconsideration is established, "the parties should not be permitted to reargue previous rulings made in the case." *Oritani Sav. & Loan Ass'n. v. Fidelity & Deposit Co.,* 744 F. Supp. 1311, 1314 (D.N.J. 1990). The Court will grant a motion for reconsideration only where its prior decision has overlooked a factual or legal issue that may alter the disposition of the matter. *United States v. Compaction Sys. Corp.,* 88 F. Supp. 2d 339, 345 (D.N.J. 1999); *see also* L. CIV. R. 7.1(i). "The operative word in the rule is 'overlooked.'" *Id.* Reconsideration is not available for a party seeking merely to reargue matters already addressed by the Court. *See G-69 v. Degnan,* 748 F. Supp. 274, 275 (D.N.J. 1990). Further, "[b]ecause reconsideration of a judgment after its entry is an extraordinary remedy, requests pursuant to these rules are to be granted 'sparingly.'" *NL Indus. v. Commercial Union Ins. Co.,* 935 F. Supp. 513, 516 (D.N.J. 1996) [*6] (quoting *Maldonado v. Lucca,* 636 F. Supp. 621, 630 (D.N.J. 1986)).

C. Analysis

Applying this standard to the facts of this case, the Court concludes that Plaintiff's motion for reconsideration must be denied. Plaintiff has not argued that there has been an intervening change in controlling law nor that reconsideration is necessary because there is new evidence. Plaintiff also does not argue that the Court made a clear error of law or should act to prevent manifest injustice. Rather, Plaintiff argues that certain facts were "overlooked" by the Court in reaching its decision. (Pl.'s Br. at 1-2; Doc. No.19.) However, all of the arguments and factual citations made in Plaintiff's motion for reconsideration were stated previously in its submission in support of a determination of damages sum certain, and the Court previously considered each and every document and argument previously presented. Further, contrary to Plaintiff's assertion that the Court "declined to consider the Assignment and Assumption Agreement dated December 8, 1997 . . . as proof of damages," the

Court considered every document carefully and did not find that damages had been proven based on those documents. (*Id.* at 1.)

In [*7] the previous motion, the thrust of Plaintiff's argument was that Defendant and his brother should be treated "50/50." However, the "50/50" arrangement, as should be applied according to Plaintiff based on the course of dealing, was not stated in the pleadings. (Doc. No. 16-1.) The argument presented to the Court during the original motion emphasized the course of dealing between Defendant, his brother Jacob Stefansky, and Penny Lane Partners pre-receivership. (*Id.*) Plaintiff did not argue that the Court should award damages to Plaintiff for the entire amount of the unfunded capital or direct the Court's attention to a provision within the four corners of the Limited Partnership Agreement or Assumption and Assignment Agreements that provides the division of liability between the assignees. Rather, Plaintiff argues that due to the course of dealing and its own mathematical error in computing the amount due, it should be entitled to $ 21,656.00 plus interest. However, a motion for reconsideration is not a vehicle to reargue and reposition one's argument, and is instead an opportunity to point out anything that the Court "overlooked." Nothing here was overlooked.

In addition, the pleadings [*8] do not set forth the theory of relief and the detail necessary to put Defendant on notice of the theory under which Plaintiff now presents to justify damages. To this end, the Court notes that it is the well-pleaded factual allegations stated in the complaint that the Court should accept as true when addressing a motion for default judgment. *See Signs by Tomorrow - USA, Inc. v. G.W. Engel Co., Inc.,* No. 05-4353, 2006 U.S. Dist. LEXIS 56456, at *5-6 (D.N.J. Aug. 1, 2006) (citation omitted). The Court will not look to the additional proofs submitted in support of a determination of damages sum certain and permit a litigant to win damages on any theory other than the original theory of liability stated in the complaint that supported the default judgment. Defendant was served with a copy of the those pleadings, and therefore, it is only that theory of liability reflected in those pleadings upon which the Court can determine damages sum certain. Because the Court did not overlook any of the material Plaintiff submitted as its bases for this motion, Plaintiff's motion is denied.

III. CONCLUSION

For the forgoing reasons, Plaintiff's Motion for Reconsideration is denied. An appropriate form [*9] of order accompanies this opinion.

Dated: March 10, 2010

/s/ Garrett E. Brown, Jr.

GARRETT E. BROWN, JR., U.S.D.J.

EXHIBIT "D"

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1 of 6 DOCUMENTS

In re: BURNS AND ROE ENTERPRISES, INC., et al., Debtors.

Civil Action No. 08-4191 (GEB)

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

2009 U.S. Dist. LEXIS 41633

May 15, 2009, Decided
May 15, 2009, Filed

NOTICE: NOT FOR PUBLICATION

PRIOR HISTORY: [*1]
Bankr. Case Nos.00-41610 and 05-47946(RG). (Jointly Administered).
In re Burns & Roe Enters., 2009 U.S. Dist. LEXIS 13574 (D.N.J., Feb. 20, 2009)

COUNSEL: For BURNS AND ROE ENTERPRISES, INC., BURNS AND ROE CONSTRUCTION GROUP, INC., Appellants: JACK MICHAEL ZACKIN, LEAD ATTORNEY, SILLS, CUMMIS, EPSTEIN & GROSS, PC, NEWARK, NJ.

For FIREMAN'S FUND INSURANCE COMPANY, Interested Party: JOHN C. KILGANNON, LEAD ATTORNEY, STEVENS & LEE PC, PHILADELPHIA, PA.

JUDGES: GARRETT E. BROWN, JR., U.S.D.J.

OPINION BY: GARRETT E. BROWN, JR.

OPINION

MEMORANDUM OPINION

BROWN, Chief Judge

This matter comes before the Court upon the Motion of Fireman's Fund Insurance Company ("FFIC") and The American Insurance Company (collectively, the "Movants") for entry of an Order modifying and/or clarifying the Court's February 2009 Confirmation Order (the "Confirmation Order") pursuant to Federal Rule of Civil Procedure 59(e). The Court, having considered the filed briefs and decided the matter without oral argument pursuant to Federal Rule of Civil Procedure 78, and for the reasons set forth in this Memorandum Opinion, will deny the Movants' motion.

I. BACKGROUND

As the facts of this case have been discussed at length in this Court's February 23, 2009 opinion (the "Confirmation Opinion"), the Court will give only a brief description of [*2] the procedural posture of the case. On December 4, 2000 (the "Petition Date") Burns and Roe Enterprises, Inc. ("BREI") filed a voluntary petition for relief under Chapter 11 of Title 11 of the United States Code (the "Bankruptcy Code"). Burns and Roe Construction Group, Inc., ("BRCGI") filed a voluntary Chapter 11 petition on October 12, 2005. The cases were administratively consolidated by Order of the United States Bankruptcy Court for the District of New Jersey (the "Bankruptcy Court") dated November 7, 2005. Since their respective bankruptcy filings, BREI and BRCGI have continued to operate their businesses and manage their assets as debtors-in-possession pursuant to § 1107(a) and § 1108 of the Bankruptcy Code.

Prior to the bankruptcy filings, there were more than 12,000 asbestos-related personal injury actions filed against Debtors. On the Petition Date, BREI filed an Adversary Proceeding in its Chapter 11 case against its primary, umbrella and excess insurance carriers, as well as carriers that had issued certain wrap-up policies. The Adversary Proceeding, *Burns & Roe Enterprises, Inc. v. Continental Casualty Co. et al,* 00-3755 (RG), seeks a declaration of BREI's rights to insurance [*3] coverage for asbestos claims.

On December 20, 2000, the Office of the United States Trustee appointed an Official Committee of Unsecured Creditors (the "Committee") which is compromised of Asbestos Personal Injury Claimants pursuant to 11 U.S.C. § 1102(a)(1). On March 19, 2002, the Bankruptcy Court entered an Order appointing Anthony R. Calascibetta as the Legal Representative of Future Asbestos Claimants in the BREI Chapter 11 case. On November 7, 2005, the Bankruptcy Court entered an Order appointing Mr. Calascibetta as the Legal Representative in the BRCGI case. Debtors filed their Fourth Amended Plan of Reorganization (the "Plan") on June 9, 2008. By Order dated September 15, 2008, on motion of the Debtors, with the support of the Committee and the Legal Representative, this Court withdrew the reference in these cases with respect to the Confirmation Hearing.

The American Insurance Company, issued a primary, wrap-up insurance policy in connection with an electric generating plant known as the Cross Generating Power Station located in South Carolina (the "Cross Station"). FFIC issued three excess, wrap up insurance policies in connection with the Cross Station.

FFIC filed certain objections [*4] to confirmation of the Debtors' Fourth Amended Plan, which are fully described in the Confirmation Opinion. A confirmation hearing was held on November 13, 2008 (the "Confirmation Hearing"). Following the Confirmation Hearing, by letter dated February 4, 2009, Debtors proposed a modification to the Plan, pursuant to which, Debtors' Rights under the FFIC Policies would not be assigned to the Trust, but rather will vest in the Reorganized Debtors following the Plan's 'Effective Date.' A full description of Debtors' submissions and FFIC's responses is found in the Confirmation Opinion.

On February 23, 2009, this Court entered the Confirmation Opinion and Confirmation Order, confirming the Debtors' Fourth Amended Plan. The Confirmation Opinion provided that FFIC lacked standing to object to confirmation since:

> As a result of the Debtors' modification to the Plan, the Debtors' interests in the FFIC Policies are not being transferred to the Trust. Rather, on the Effective Date, the Debtors' rights in the FFIC Policies will vest in the Reorganized Debtors pursuant to Section 10.1 of the Plan and 11 U.S.C. §§ 1123(a)(5)(A) and 1141(b). As a result, the Debtors' coverage under the FFIC Policies [*5] will remain in place, unaffected by the Plan. Any claims that are asserted for which the FFIC Policies provide coverage will be subject to the same contractual rights and obligations as existed prior to the commencement of the Debtors' Chapter 11 cases. FFIC will not be prejudiced by confirmation since it will be placed back into the identical position existing prior to the commencement of the Debtors' Chapter 11 cases. While FFIC has argued that "these most recent modifications do not alleviate the possibility FFIC will be compelled to provide coverage under the FFIC Policies, even if Debtors are relieved of their corresponding contractual obligations through the discharge and injunction provisions in the Fourth Amended Plan, from which FFIC is not adequately excluded," FFIC retains the right to argue that the Debtors breached the terms of the FFIC Policies. *See In re Mid-Valley, Inc.*, et al., 305 B.R. 425, 431 (Bankr. W.D. Pa. 2004).

(Confirmation Opinion at 49.)

On March 5, 2009, Movants timely filed the instant Motion for Modification and/or Clarification of the Confirmation Order.

II. DISCUSSION

Movants assert that "[a]bsent clarification and/or modification of the Confirmation Order, [*6] there is a substantial risk that another court will conclude that confirmation of the Fourth Amended Plan relieved Reorganized Debtors of their corresponding contractual obligations under the FFIC Policies -- a result that would be clearly at odds with this Court's express intent." (Mem. of Law of Fireman's Fund Insurance Company, et. al. in Supp. of Mot. for Modification and/or Clarification of Confirmation Order (the "Motion") at 14.) Movants propose certain modifications to the Confirmation Order which they claim are necessary to prevent a manifest injustice.

First, Movants allege that the Confirmation Order "does not expressly provide that the FFIC Policies, together with all contractual rights and corresponding obligations, will vest unmodified in the Reorganized Debtors on the Effective Date." (Motion at 2.) Movants propose amending Section VIII of the Confirmation Order to provide that:

> Any interests or Insurance Rights that Debtors' may have in the FFIC Policies will not be transferred to the Trust. Rather, on the Effective Date, notwithstanding any provision in the Confirmation Order, Fourth Amended Plan or any re-

> lated document to the contrary, any interest Debtors claim to [*7] have in the FFIC Policies, along with their corresponding contractual obligations under the FFIC Policies, will vest unmodified in the Reorganized Debtors pursuant to 11 U.S.C. §§1123(a)(5) and 1141.

(*Id.* at 15-16.)

Second, Movants contend that the Confirmation Order does not include "language that would effectuate the Court's conclusion that confirmation will not adversely affect FFIC." (Motion at 2.) Movants propose the insertion of the following "insurance neutrality" language in the Confirmation Order:

> Notwithstanding any other terms or provisions in the Plan, this Confirmation Order or any related document to the contrary, this Confirmation Order: (i) is without prejudice to the rights, remedies, claims, exclusions, limitations and/or defenses of FFIC, The American Insurance Company and/or any other of their related insurance companies (collectively, "FFIC") under any insurance policies issued by FFIC that may provide coverage for Debtors and/or under any agreements relating to such insurance policies (collectively, the "FFIC Policies") and/or any of the reservation of rights by FFIC as to any issues relating to the FFIC Policies; (ii) confirms that all of the terms, provisions, [*8] conditions, limitations and/or exclusions contained in the FFIC Policies shall remain in full force and effect; (iii) confirms that the Named Insured and any entity or person who qualifies as an Additional Insured or Insured under the FFIC Policies shall remain bound by all of the terms, provisions conditions, limitations and/or exclusions contained in the FFIC Policies; (iv) confirms that nothing in the Plan, this Confirmation Order or any related document shall be deemed to create any insurance coverage that does not otherwise exist, if at all, under the terms of the FFIC Policies, or create any direct right of action against FFIC or otherwise constitute a judicial determination that the FFIC Policies provide insurance coverage to the Debtors and/or Reorganized Debtors; (v) confirms that Confirmation is without prejudice to any of FFIC's rights, claims and/or defenses in any subsequent litigation in any appropriate forum in which FFIC may seek a declaration regarding the nature and/or extent of any insurance coverage under the FFIC Policies; (vi) confirms that Debtors and/or Reorganized Debtors shall satisfy all continuing duties and obligations of the insureds under the FFIC Policies; [*9] and (vii) confirms that nothing in the Plan, this Confirmation Order or any related document shall be construed as a judicial determination that either the FFIC Policies cover or otherwise apply to any Claims or that any Claims are eligible for payment under any of the FFIC Policies.

(*Id.* at 16-17.)

Third, Movants contend that "the discharge injunction provisions in the Confirmation Order appear to expressly enjoin FFIC from either seeking to enforce Reorganized Debtors' contractual obligations or to commence a subsequent declaratory judgement action to determine whether coverage exists under the FFIC Policies" and "also appear to enjoin FFIC from seeking to enforce contribution claims against third parties." (*Id.* at 11.)

Movants posit that under Section VI.A of the Confirmation Order, "absent the requested modifications to the Confirmation Order, Reorganized Debtors can conceivably rely on the express language of the Confirmation Order for the proposition that they have been discharged of the remaining obligations under the FFIC Policies -- while FFIC would remain obligated to continue to perform its contractual obligations." (*Id.* at 10.)

Movants propose amending the Confirmation Order [*10] to provide that the discharge and injunction provisions of the Fourth Amended Plan do not apply to FFIC or the FFIC Policies by including the following language:

> Notwithstanding anything to the contrary in the Fourth Amended Plan or in this Order, the discharge and injunction provisions included in the Fourth Amended Plan and as set forth in this Order (i) shall not discharge Debtors or Reorganized Debtors from any of their obligations under the FFIC Policies, (ii) shall not enjoin FFIC from commencing any action against Debtors or Reorganized Debtors either with respect to the rights and obligations of Debtors or Reorganize

> Debtors and FFIC under the FFIC Policies or otherwise with respect to whether any coverage for claims exists in connection with the FFIC Policies, and (iii) shall not enjoin FFIC from commencing any action against any party other than the Debtors or Reorganized Debtors for contribution in connection with any alleged coverage obligations under the FFIC Policies.

(*Id.* at 19.)

Fourth, Movants assert that the statement in the Confirmation Opinion that "Debtors' coverage under the FFIC Policies will remain in place, unaffected by the Plan" requires clarification. (*Id.* at 19.) [*11] Movants propose including the following language in the Confirmation Order:

> The Court has not considered and has not determined any issue of fact or law in connection with any alleged obligations of FFIC under the FFIC Policies, and nothing contained in this Order or in the Opinion of the Court entered on February 23, 2009 [District Court Docket Item No. 36] is intended to be in the nature of, nor shall it be construed as, determining any issues of fact or law in connection with any alleged obligations of FFIC under the FFIC Policies.

(*Id.* at 20.)

Fifth, Movants seek clarification of Section VIII. of the Confirmation Order which currently provides that:

> Based upon the record of these Reorganization Cases, the Court hereby determines that all of the objections to Confirmation, whether informal or filed (the "Objections"), to the extent not satisfied by the Modifications or by separate agreement, have been consensually resolved or otherwise voluntarily withdrawn except for the objection filed by Fireman's Fund Insurance Company, which objection is hereby overruled.

Movants assert that such clarification is necessary to determine "whether the Court considered FFIC's Confirmation Objections [*12] on the merits and overruled such objections or, instead, made a threshold determination that FFIC lacked standing and therefore did not consider the merits of those objections." (*Id.* at 21.)

Debtors filed a brief in response on March 23, 2009. The Debtors' brief alleges that FFIC lacks standing to request modification of the Confirmation Order. (See Debtors' Br. in Resp. to the Mot. (the "Response") at 1).

Debtors argue that "FFIC fails to identify a single provision of the Confirmation Order that it contends constitutes a clear error of law or that will result in a manifest injustice" and therefore fails to demonstrate entitlement to relief under Federal Rule of Civil Procedure 59(e). (*Id.* at 1.) Debtors contend that the "modifications to the Plan set forth in paragraphs B. 5, 6 and 7 of the Confirmation Order clearly provide that the Debtors' rights in the FFIC Policies are not being assigned to the Trust." (*Id.* at 2.) Debtors assert that "[n]othing in the Confirmation Order even remotely suggests that FFIC is required to provide coverage to the Debtors if applicable non-bankruptcy law would excuse it from doing so." (*Id.*)

Debtors reject FFIC's proposed modifications as "unnecessary," [*13] and assert that the "suggested language would provide FFIC with greater rights that it had prior to the commencement of the Chapter 11 cases and/or jeopardize the Debtors' settlements with its other insurance carriers." (*Id.* at 3.)

Movants filed a reply memorandum on March 30, 2009. Movants argue that "courts have consistently recognized that a party to a legal proceeding has standing to file a motion under Federal Rules of Civil Procedure 59(e) to seek reconsideration of an order entered in that proceeding." ((Reply Mem. of the Movants in Further Supp. of the Mot.(the "Reply") at 1) (citing *United States v. Manville Sales Corp.*, 2005 U.S. Dist. LEXIS 45543, 2005 WL 526695 (N.D. Ill. 2005); *United States v. Westwind Group, Inc.*, 417 F.Supp. 2d. 1246, 1248 (N.D. Ala. 2006); *In re SRC Holding Corp.*, 2007 U.S. Dist. LEXIS 36359, 2007 WL 1464385, n.5 (D. Minn. 2007)).

Movants contend that "unless the Confirmation Order is modified, FFIC faces a substantial risk that a court in subsequent litigation will conclude that confirmation of the Fourth Amended Plan impaired FFIC's contractual rights and relieved Reorganized Debtors of their corresponding contractual obligations under the FFIC Policies." (*Id.* at 3.)

Movants submit that the "proposed modifications [*14] are necessary to eliminate the 'manifest injustice' that would result if the Confirmation Order were interpreted in a manner that is inconsistent with the Confirmation Opinion." (*Id.* at 4.)

A. Standard of Review

The standard for reconsideration is high, and reconsideration is to be granted only sparingly. *United States v. Jones,* 158 F.R.D. 309, 314 (D.N.J. 1994) (citing *Maldonado v. Lucca,* 636 F.Supp. 621, 630 (D.N.J. 1986)). The Movant has the burden of demonstrating either: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court [issued its order]; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Cafe v. Quinteros,* 176 F.3d 669, 677 (3d Cir. 1999) (citing *N. River Ins. Co. v. CIGNA Reins. Co.,* 52 F.3d 1194, 1218 (3d Cir. 1995)). The Court will grant a motion for reconsideration only where its prior decision has overlooked a factual or legal issue that may alter the disposition of the matter. *United States v. Compaction Sys. Corp.,* 88 F. Supp.2d 339, 345 (D.N.J. 1999). "The operative word in the rule is 'overlooked'." *Id.* Reconsideration is not available for a [*15] party seeking merely to reargue matters already addressed by the Court. *See G-69 v. Degnan, 748 F. Supp.* 274, 275 (D.N.J. 1990). Further, "[a] rule 59(e) motion is not to be used as a vehicle to advance additional arguments that a party could have made before judgement but neglected to do so." *Mobil Oil Corp. v. Amoco Chem. Corp.,* 915 F. Supp. 1333, 1377 (D. Del. 1995) (citing *Dodge v. Susquehanna Univ.,* 796 F. Supp. 829, 830 (M.D. Pa.1992)).

B. Analysis

Movants seek relief under Federal Rule of Civil Procedure 59(e). Additionally, to the extent that such modifications relate to a clerical error, Movants seek relief pursuant to Federal Rule of Civil Procedure 60(a). However, Federal Rule of Civil Procedure 60(a) is not applicable as the requested modifications go beyond merely correcting a "clerical mistake or a mistake arising from oversight or omission" and instead seek to alter the substantive rights of the parties. *See United States v. Stuart,* 392 F.2d 60, 62 (3d Cir. 1968) (stating that "Rule 60(a) is concerned primarily with mistakes which do not really attack the party's fundamental right to the judgment at the time it was entered.").

In the instant motion, Movants do not allege [*16] an intervening change in the controlling law, the availability of new evidence, or the need to correct a clear error of law. Rather, Movants sole contention is that the Confirmation Order does not mirror the Confirmation Opinion, and that a manifest injustice may incur if a court in subsequent litigation concludes that "confirmation of the Fourth Amended Plan impaired FFIC's contractual rights and relieved Reorganized Debtors of the their corresponding contractual obligations under the FFIC Policies." However, the arguments proffered by the Movants in support of the modifications are identical to FFIC's objections to confirmation.

Concerning the Movants' request that the Confirmation Order be modified and/or clarified to explicitly provide that the FFIC Policies will vest unmodified in the Reorganized Debtors on the Effective Date, this Court's Confirmation Opinion provides that "on the Effective Date, the Debtors' rights in the FFIC Policies will vest in the Reorganized Debtors pursuant to Section 10.1 of the Plan and 11 U.S.C. §§ 1123(a)(5)(A) and 1141(b)." Movants' motion papers acknowledge in a footnote that "[w]hile the FFIC Policies would arguably vest with the Reorganized Debtors [*17] pursuant to Section VII of the Confirmation Order, that section makes clear that the FFIC Policies would vest in the Reorganized Debtors free and clear of all Claims, Demands, Interests, Liens and Encumbrances . . . this provision cannot effectuate the vesting of the FFIC Policies in Reorganized Debtors . . . because it would result in the discharge of Debtors' corresponding contractual obligations under the FFIC Policies." (Motion at 10, n.9).

Movants' contention that the discharge provisions of the Confirmation Order would discharge Debtors of their reciprocal contractual obligations under the FFIC Policies, has already been heard, and addressed, by the Court. In a letter to the Court dated February 11, 2009, FFIC argued that "under the discharge and injunction provisions in the Fourth Amended Plan, FFIC would face a significant risk that FFIC's contractual rights, as well as Debtor's corresponding contractual obligations, would be discharged if the Fourth Amended Plan is confirmed." The Court specifically rejected these arguments in the Confirmation Opinion by stating that "[w]hile FFIC has argued that 'these most recent modifications do not alleviate the possibility that FFIC will [*18] be compelled to provide coverage under the FFIC Policies, even if Debtors are relieved of their corresponding contractual obligations through the discharge and injunction provisions in the Fourth Amended Plan, from which FFIC is not adequately excluded,' FFIC retains the right to argue that the Debtors breached the terms of the FFIC Policies." (Confirmation Opinion at 49).

Concerning Movants' request for inclusion of language regarding the insurance neutrality of the Plan, FFIC's February 11, 2009 letter also stated that "absent the inclusion of appropriate insurance neutrality language, FFIC's objections to the Fourth Amended Plan have still not been completely resolved." The Confirmation Opinion clearly rejected this argument by providing that "FFIC will not be prejudiced by confirmation since it will be placed back into the identical position existing prior to the commencement of the Debtors' Chapter 11 cases." (Confirmation Opinion at 49.)

Concerning Movants' request for clarification of the sentence in the Confirmation Opinion that "the Debtors' coverage under the FFIC Policies will remain in place, unaffected by the Plan," this sentence simply refers to Debtors' February 4, 2009 [*19] modifications to the Plan, and does not appear in the Confirmation Order. As the Confirmation Opinion clearly provides "FFIC retains the right to argue that the Debtors breached the terms of the FFIC Policies," there is no danger that the above referenced sentence may be construed to suggest that coverage is or will be available to Debtors and/or that nothing has happened since the commencement of the bankruptcy cases which may affect coverage under the FFIC Policies. Additionally, Movants' motion papers acknowledge in a footnote that "[i]nsurance coverage actions are state law issues that cannot be finally adjudicated by bankruptcy courts as they are not Core proceedings . . .[and] even if coverage issues can be litigated in a bankruptcy case such would have to occur in the context of an adversary proceeding under Federal Rules of Bankruptcy Procedure 7001, *et seq.,* and not in a contested matter under Federal Rule of Bankruptcy Procedure 9014 such as a confirmation hearing. ((Motion at 19, n.16) (citing *In re United States Brass Corp.,* 110 F.3d 1261, 1268 (7th Cir. 1997)). Therefore, the proposed modification is not necessary to prevent a manifest injustice.

Lastly, concerning Movants' [*20] request for clarification of Section VIII of the Confirmation Order, Section VIII currently provides:

> Based upon the record of these Reorganization Cases, the Court hereby determines that all of the objections to Confirmation, whether informal or filed (the "Objections"), to the extent not satisfied by the Modifications or by separate agreement, have been consensually resolved or otherwise voluntarily withdrawn except for the objection filed by Fireman's Fund Insurance Company, which objection is hereby overruled.

In the course of confirming the Plan, the Court considered all of FFIC's submissions, and for the reasons specified in the Confirmation Opinion, overruled FFIC's objections after concluding that FFIC lacked standing to object to confirmation.

For all these reasons, the Court is satisfied that the plain terms of the Confirmation Order are clear, and the proposed amendments to the Confirmation Order are not required to prevent a manifest injustice. Therefore, the Court concludes that Movants have failed to meet the heavy burden necessary to alter or amend a judgment under Federal Rule of Civil Procedure 59(e). Movants simply disagree with the outcome of the Confirmation Opinion, [*21] which is not the proper subject matter for a motion for reconsideration. *See G-69 v. Degnan,* 748 F. Supp. 274, 275 (D.N.J. 1990) (stating that reconsideration not available for mere re-argument of matters addressed by the Court).

III. CONCLUSION

For the foregoing reasons, the Motion of Fireman's Fund Insurance Company ("FFIC") and The American Insurance Company is denied. An appropriate form of Order accompanies this Opinion.

Dated: May 15, 2009

/s/ Garrett E. Brown, Jr.

GARRETT E. BROWN, JR., U.S.D.J.